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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 245

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALGOMA LUMBER COMPANY, A CORPORATION

No. 246

THE UNITED STATES OF AMERICA, PETITIONER

v.

FOREST LUMBER COMPANY, A CORPORATION

No. 247

THE UNITED STATES OF AMERICA, PETITIONER

v.

LAMM LUMBER COMPANY

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims are not yet officially reported.

JURISDICTION

The judgments of the Court of Claims were entered January 12, 1938. Motions for new trials were overruled on May 2, 1938. The jurisdiction of this Court rests on Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether contracts, made pursuant to Section 7 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 406), and the regulations issued thereunder, which provide for the sale of standing timber on unallotted lands of an Indian tribe and which designate the Indians as vendors of the timber, are contracts of the United States, cognizable by the Court of Claims under Section 145 of the Judicial Code.

2. Whether contracts for the sale of standing timber on land allotted to individual Indian allottees, made by such allottees pursuant to Section 8 of the Act of June 25, 1910 (U. S. C., Title 25, Sec. 407), and regulations issued thereunder, are contracts of the United States, cognizable by the Court of Claims under Section 145 of the Judicial Code.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, p. 36.

STATEMENT

These three cases arose out of an alleged overpayment under contracts for the sale of timber on

certain unallotted and allotted Indian lands in the Klamath Reservation in Oregon. The cases arose at the same time and place, and involve the same questions of law. They were considered together and judgments were entered at the same time. The court cited the decision in the *Forrest Lumber Company* case as the authority for the determination of the *Algoma Lumber Company* case, whereas in the *Lamm Lumber Company* case a separate opinion was rendered employing, with respect to the question involved here, substantially the same language as that used in the Forrest decision. However, the United States has treated the *Algoma Lumber Company* case as the test case, and it contains the most comprehensive findings of fact. Accordingly, in this brief the facts in that case alone will be referred to, and the references to findings of fact will be to those made in the *Algoma* case, except where the context indicates reference to the other cases. A determination of the applicable question of law in any one case will be determinative in the other two cases.

The respondent Algoma Lumber Company, pursuant to advertisement and bids, entered into a contract on July 28, 1917, for the purchase of timber from certain designated lands in the Klamath Reservation. The contract was approved by the Secretary of the Interior on September 14, 1917 (Fdg. 5, R. 11). In addition to providing for the

sale of timber from unallotted tribal lands, it also stated that certain allotted lands were located in the area described, and authorized the respondent to contract with the Indian allottees for the purchase of standing timber on such allotted land (Fdg. 5, R. 13). Thereafter the respondent entered into contracts with the several allottees and those contracts were duly approved by the Secretary of the Interior or the Commissioner of Indian Affairs (Fdg. 21, R. 39-40). Merely as a means of convenient description the contracts relating to timber on the unallotted tribal lands will be referred to in this brief as the tribal contracts.

The contracts provided that the stumpage rates were to be fixed for three-year periods by the Commissioner of Indian Affairs, but that any increase in such rates should "not exceed fifty percent of the increase in the average mill run wholesale net value of lumber * * * during the three years preceding January 1 of the year in which the new prices are fixed" (Fdg. 5, R. 13).

The court below found in substance that as of April 1, 1928, the Commissioner of Indian Affairs increased the stumpage rate by forty cents per thousand, contrary to the terms of the contract. The respondent duly protested, but was compelled to pay, during the years 1928, 1929, and 1930, the additional sum of $25,094.56, which represented the increase in price of forty cents on the stumpage

rates for the timber cut by the respondent during those three years.[1]

The court below also found (Fdg. 21, R. 38–40) that the contracts for the sale of the timber on the Indian reservation involved herein was authorized by Sections 7 and 8 of the Act of June 25, 1910, and the regulations promulgated by the Secretary of the Interior pursuant to such Act; that the Department of the Government engaged in the administration of Indian Affairs has always treated the Indian forests as private property held in sacred trust by the United States for the Indians; that on some reservations the merchantable stand of timber was practically the only source of revenue from which the cost of social and industrial betterments of the Indian tribe could be met; that the form of contract involved in the instant case has been used in every sale of timber on the Indian reservations since the passage of the Act of June 25, 1910; that prior to the Act of June 25, 1910, contracts for the sale of timber from unallotted lands were substantially similar in form to the present contract so far as relates to the parties thereto; that tribal and allotment contracts were made and administered as if only one contract were

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[1] In the *Forest Lumber Company* case the increased cost, as the result of the 40-cent advance in prices between April 1, 1928, and April 1, 1930, amounted to $44,772.62 (Fdg. 17, R. 23, *Fo[illegible]* case). In the *Lamm Lumber Company* case the amount of increased stumpage paid between April 1, 1928, and April 30, 1929, amounted to $12,126.39 (Fdg. 9, R. 30, *Lamm* case).

involved; but that all contracts for the purchase of timber on allotments held by individual Indians were made with the holders of such allotments and that contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber and by the administrative department concerned to be contracts made for the respective tribal or individual Indians designated therein, and such contracts have been made under the supervision of the Secretary of the Interior and specifically the Commissioner of Indian Affairs for the sole benefit of either the tribe or individual Indians concerned.

The proceeds from the sale of such timber were paid to the Superintendent of the Indian School and the amounts received by him, less 8 percent deducted and used to defray the cost of administering the contracts and the Indian forests, were deposited either in private state banks or in the Treasury of the United States to the credit of the tribal or individual Indians concerned (Fdg. 23, R. 41–42). No part of the beneficial income from the sale of timber on Indian reservations accrued to the benefit of the United States (Fdg. 23, R. 41). The proceeds of sale of the timber have always been treated as belonging to the Indians, either tribal, or individual, and not as public money of the United States (Fdg. 24, R. 42–43).

In April 1931 the respondent filed suit in the Court of Claims to recover from the United States

the amount representing the increase of 40 cents in stumpage rates for the timber cut by the respondent during 1928, 1929, and 1930. On June 12, 1934, the United States filed a plea to the jurisdiction asserting that the Court of Claims lacked jurisdiction to entertain a suit of this character. The plea was overruled and on a hearing on the merits the Court of Claims held that it had jurisdiction to entertain the suit, and entered judgment for the respondent.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In taking jurisdiction of the instant case.

2. In holding that a contract for the sale of timber on tribal lands executed by the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, and approved by the Assistant Secretary of the Interior, wherein the Indian tribe is named as the vendor, is a contract of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

3. In holding that the several contracts entered into by individual Indian allottees for the sale of standing timber and approved by the Secretary of the Interior are contracts of the United States cognizable by the Court of Claims under Section 145 of the Judicial Code.

4. In holding that all of the contracts involved in these three cases were contracts of the United States.

5. In failing to find separately the excess costs resulting from the increase of 40 cents per thousand in respect of the timber cut on allotted land as distinguished from that cut on unallotted land during the years in which such increase was in effect.

6. In entering judgment for the respondent against the United States.

SUMMARY OF ARGUMENT

1. The contracts relating to the sale of timber on lands allotted to individual Indians were made by the Indians themselves and were merely approved by Federal officers, who did not become parties to them. Such contracts related clearly to property of the individual allottees, not property of the United States, and were in no sense contracts of the United States. Consequently, the Court of Claims had no jurisdiction to entertain suits based upon them.

Moreover, the tribal contracts, executed by the Superintendent of the Klamath Indian School on behalf of the tribe, expressly disavowed intention to sell under such contracts timber from allotted lands. Consequently, the United States had no liability under the tribal contracts with respect to timber taken from the allotted lands.

The Court of Claims having failed to distinguish the amounts recoverable for timber taken from allotted lands and for that taken from unallotted lands, these cases should be remanded to the Court of Claims to find such amounts separately, if it

should be held that the tribal contracts alone are contracts of the United States.

2. The contracts relating to timber from tribal lands are contracts of the Klamath Indians, not contracts of the United States. They provide for disposition of Indian property, rather than property of the United States. The United States was not beneficially interested in its own right in the proceeds of their performance and if a party to them at all, was a party only in a representative capacity.

The Superintendent of the Klamath Indian Reservation was the agent designated by law to act for the Indians in the sale of timber on tribal lands and, acting as such agent, he executed the tribal contracts, as the contracts expressly recite, on behalf of the Indians, not on behalf of the United States.

If, however, the United States was a party to these contracts, it was a party in a peculiar representative capacity which does not involve affirmative personal responsibility such as might fall upon a trustee or guardian acting on behalf of private persons. Furthermore, none of the provisions made or steps taken in these transactions to protect the Indians in the realization of income from the sale of their property gave rise to any affirmative liability of the United States.

3. The Court of Claims has no jurisdiction under Section 145 of the Judicial Code to entertain suits against the United States in such representative

capacity as it may have had in these transactions. Previous decisions of this Court and of the Court of Claims indicate that the United States is not a proper party to a suit against an Indian tribe even where it has been designated as trustee for the Indians. They indicate further that the Court of Claims has no jurisdiction to entertain a suit against the United States where, as in this case, the moneys in question are held by public officers of the United States for specific purposes and are not public moneys of the United States available to pay any judgment rendered. Section 145 of the Judicial Code, being an Act waiving the sovereign immunity of the United States, is to be strictly construed. The burden is upon the respondents to sustain the jurisdiction by showing that these contracts are contracts of the United States within the meaning of that provision. That requirement is particularly applicable in this case where the substantial ultimate effect of the judgment is likely to be to permit recovery to be realized out of Indian funds without Congress having had the opportunity, which normally it has in such cases before suit is begun, to consider the equities of the claim and ascertain the propriety of waiving the sovereign immunity to suit. We believe that under existing statutory provisions the respondents' remedy is to seek from Congress special authorization to proceed to recover the amount to which they claim they are entitled from the Indian funds which have been enhanced by the alleged breach.

ARGUMENT

Section 145 of the Judicial Code provides that the Court of Claims shall have jurisdiction over claims founded upon any contract, express or implied, with the Government of the United States. It is under that provision that the jurisdiction of the Court of Claims is asserted in these cases. It is our position that neither the contracts for the sale of timber from allotted lands nor the tribal contracts for the sale of timber from unallotted lands are contracts with the Government of the United States within the meaning of that provision.

I

THE CONTRACTS MADE BY INDIVIDUAL INDIANS FOR THE SALE OF TIMBER UPON THEIR ALLOTMENTS ARE CONTRACTS OF THE INDIVIDUAL ALLOTTEES, NOT CONTRACTS OF THE UNITED STATES

The contracts involved in these cases relate to the sale of timber on defined areas of land within the Klamath reservation. In each instance the area was specified in the contract. There were lands in each area which were no longer tribal lands but which had been allotted to individual Indians. The tribal contract first executed in each case was made by the Superintendent of the Klamath Indian School acting, according to the terms of the contract, "for and on behalf of the Klamath Indians" (R. 6). These tribal contracts did not purport to sell any timber from the allotted

lands but merely authorized the respondents to make separate contracts with the individual allottees for the purchase of timber on allotments located within the sales area. This was in consonance with Section 8 of the Act of June 25, 1910, *infra*, p. 36, which authorized the allottees themselves to enter into contracts for the sale of standing timber, subject to the approval of the Secretary of the Interior.[2]

A typical allotment contract is set forth in the *Lamm Lumber Company* case, No. 247 (R. 18–22). It is apparent that such contracts are not contracts of the United States. They are contracts made by the individual Indians for the sale of timber which belonged to them as allottees of specific tracts of land. In them the allottees, in their own right, undertake to sell the timber upon their allotments, having been authorized to do so by Section 8 of the Act of 1910 (*supra*). They could sell or not as they chose. That Act had made the individual allottee the sole judge of whether he wished to sell, and the contracts entered into on behalf of the tribe with respect to unallotted lands did not undertake to commit any allottee to a sale.

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[2] The Indian allottees held their land under patents issued under Section 5 of the Act of February 8, 1887, c. 119, 24 Stat. 388, 389–390 (U. S. C., Title 25, Sec. 348). That section provided that any conveyance of the lands allotted during the trust period or any contract made with reference to such lands should be absolutely null and void. However, Section 8 of the Act of June 25, 1910, had removed this restriction and permitted the allottee to make a valid contract for the sale of the timber.

The required approval of the allottee's contracts by the Secretary of the Interior does not make them contracts of the United States. The sole purpose of requiring the Secretary's approval is to prevent improvident alienation or leasing by restricted allottees. The Secretary's power is a mere veto power, a power to disapprove the sale. He has no authority to alien or lease the property in the allottee's stead. *Mott* v. *United States*, 283 U. S. 747. Accordingly, his approval noted on these contracts is no more than a memorandum that he did not exercise, in these instances, his purely negative power to disapprove. It does not make the Secretary a party to the contract in any sense. *Jennings* v. *Wood*, 192 Fed. 507, 508 (C. C. A. 8th).

It is apparent, therefore, that no one but the allottee had a right to contract to sell the timber on the allotted lands; that in these cases no one but the allottees did contract to sell timber on such lands (No. 245, R. 39); that the contracts made by the allottees were in no sense contracts of the United States, and, consequently, that the Court of Claims was without jurisdiction to entertain suits based upon them.

Nor can the judgments against the United States with respect to timber sold from allotted lands be sustained as based upon the contracts made by the Superintendent on behalf of the tribe. Even if

those contracts should be considered to be contracts of the United States, they expressly disavowed any intention of selling timber on any allotted lands, and the United States could not be liable solely because it had authorized the respondents to make separate contracts for the purchase of such timber.[8]

II

THE CONTRACTS RELATING TO TIMBER FROM TRIBAL LANDS ARE CONTRACTS OF THE KLAMATH INDIANS, NOT CONTRACTS OF THE UNITED STATES

The court below reached the conclusion that the tribal contracts were entered into by the Superintendent, not as agent for the Indians but as a representative of the United States, which the court below considered to be acting "somewhat in the manner that a guardian might act for a ward." Accordingly the court held that the tribal contracts were contracts of the United States, and conse-

[8] In Nos. 245 and 246 the petitioners, in their brief in opposition (pp. 4–5) admit that the judgments rendered included the allegedly excessive amount charged for timber on both allotted and unallotted lands. The same is true of the judgment in No. 247 in which no brief in opposition was filed. If this Court should conclude that these contracts made by allottees with respect to timber from allotted lands are not contracts of the United States but that the tribal contracts, on the contrary, are contracts of the United States, cognizable by the Court of Claims, the cases should be remanded to that court with instructions to limit the judgments against the United States to any excess charged for timber under the tribal contracts.

quently that it had jurisdiction under Section 145 of the Judicial Code to entertain claims based upon them. We submit that that holding is erroneous, and that it does not accurately reflect either the true character of the relationship between the United States and the Indians or the true character of the title of tribal Indians to timber lands upon which they reside. Moreover, it fails properly to construe the jurisdiction which Section 145 of the Judicial Code conferred upon the court below.

A. THE CONTRACTS DID NOT RELATE TO PROPERTY OF THE UNITED STATES, AND WERE NOT FOR THE BENEFIT OF THE UNITED STATES

Title to the timber involved in the tribal contracts was in the Klamath Indians. The Klamath Indians have held the land upon which the timber was located from time immemorial.[4] By a treaty dated October 14, 1864, they had ceded the major portion of their original holdings to the United States, but the present portion was retained to be occupied by the tribe as an Indian reservation. *United States* v. *Klamath Indians*, 304 U. S. 119, 121, 122; see 32 L. D. 664, 666. The title which the Indians hold has been described as the right to the beneficial use and possession of the area they occupy. Conversely, the title which the United States holds has been held to be merely the exclusive right

[4] House Misc. Documents, 51st Cong., 1st Sess., Vol. 44, No. 272, Part 1.

to purchase the land from the Indians if the Indians are willing to sell, for a price which the Indians are willing to accept. *Worcester* v. *Georgia*, 6 Pet. 515, 580; *Holden* v. *Joy*, 17 Wall. 211, 244; *Leavenworth, etc., R. R. Co.* v. *United States*, 92 U. S. 733, 742–743. The kind of title which treaty Indians have in a reservation is the same as that which the original Indian occupants had, subject, of course, to conditions imposed by the treaty. *United States* v. *Shoshone Tribe*, 304 U. S. 111, 117. Accordingly, this Court has held that the Indians' title is as valuable as a full title in fee, and that, in effect, the tribe owns the land, together with all minerals, and timber located upon it. Such ownership is said to be reflected by the construction which the United States and the Indians have placed upon their title. In the *Shoshone* case, this Court said (pp. 117–118):

> Provision in aid of teaching children and of adult education in farming, and to secure for the tribe medical and mechanical service, to safeguard tribal and individual titles, when taken with other parts of the treaty, plainly evidence purpose on the part of the United States to help to create an independent permanent farming community upon the reservation. Ownership of the land would further that purpose. In the absence of definite expression of intention so to do, the United States will not be held to have kept it from them.

From the principles set down in the *Shoshone* case, it would seem to follow that title to the timber on the Klamath reservation was in the Indians and that the tribal contracts were contracts for the sale of Indian property, not property of the United States.

Furthermore, the United States was not beneficially interested in the contracts. The tribal contracts recite that they were entered into between the Superintendent of the Klamath Indian School "for and on behalf of the Klamath Indians, party of the first part," and the respondent. None of them purports to have been entered into on behalf of the United States. No obligation was specified in any of them which the United States was required by the terms of the contracts, or by implication, to perform, and none which the United States could perform. The United States was not entitled to receive, nor did it receive, the beneficial interest in any of the proceeds of the respondent's performance. The contracts were made on behalf of the Indians, disposed of the Indians' property, and required the respondents to make payments to the Superintendent of the Klamath Indian School for and on behalf of the Indians. All of the proceeds were deposited to the credit of the Indians, except a sum retained to defray the expenses of administering their property, particularly the expenses incident to the timber cutting operation.

These circumstances indicate that these tribal contracts were not contracts for the sale of property of the United States and that they were not made for the benefit of the United States. If the United States was a party to them at all, it was merely in a representative capacity. The character and direction of the responsibility of the officers who acted in these cases is therefore the essential factor to be ascertained. The court below said that in executing the contracts the Superintendent was not acting as agent of the Indians and said further that the United States acted in this transaction "somewhat in the manner that a guardian might act for a ward." The United States has also been referred to as the "trustee" of the property of the Indians. However, the effective incidents of the relation of the United States to the Indians have not been worked out, and on the whole cannot be worked out fairly or precisely by reliance upon merely descriptive, convenient references, such as these, to categories and formulae of general law. They must be evolved through careful analysis of the characteristics and requirements of particular situations. We believe that the relation of the United States and its officers to the Indians and their property in this case has qualities and incidents which distinguish it in significant particulars from the usual fiduciary relationships between private persons and that the rights and responsibilities which arise out of it can be determined correctly only through consider-

ation of its peculiar characteristics as a unique and distinctive relationship.[5] Accordingly we shall not attempt to fit it precisely into one or another of the established general categories, but rather shall point out those factors involved in the situation which we believe to be significant in reaching a correct practical result in these cases. We believe that the balance of these factors points to the conclusion that these are not contracts of the United States within the meaning of the Act conferring jurisdiction upon the Court of Claims and that the court below, in treating them as contracts of the United States, has achieved a result inconsistent with the intention of the statute and inimical to the fair and effective fulfillment by the United States of its duties with respect to the Indians' property.

B. THE SUPERINTENDENT REPRESENTED THE INDIANS IN EXECUTING THE CONTRACTS

The salary of the Superintendent of the Indian School of the Klamath reservation is paid out of the tribal funds.[6] He has general supervision over

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[5] Cf. *Rustomjee* v. *The Queen* (1876), 1 Q. B. L. R. 487.

[6] We are informed by the officials of the Office of the Commissioner of Indian Affairs that this statement is true with reference to the Klamath Indians. The findings of the court below fail to discuss this fact. It is reflected in the appropriation bills for the Department of the Interior, which do not appear to make any other provision for the pay of the Superintendent. See c. 86, 40 Stat. 561, 584–585; c. 199, 42 Stat. 552, 576; c. 42, 42 Stat. 1174, 1197. We call this to the attention of the Court merely to apprise the Court, as fully as possible, of all the significant facts.

and management of the Indians' affairs. He has been said to act as their "agent and guardian" *United States* v. *Sinnott*, 26 Fed. 84, 86 (C. C. D. Ore.). By regulations,[1] he is designated as their agent for the purpose of selling their timber. Cf. *Parks* v. *Ross*, 11 How. 362. He executed these contracts expressly "for and on behalf of the Klamath Indians" (R. 6).

This is consistent with the manner in which sales of the Indians' timber have long been regarded. Before the passage of the Act of June 25, 1910, sales of timber on Indian reservations were considered as made by the Indians. They, not the United States, were the vendors of the timber. *Pine River Logging Co.* v. *United States*, 186 U. S. 279, 295. Nothing in that Act changed their relationship to such sales in this fundamental respect. The court below found specifically that: "Contracts for the sale of timber on unallotted or allotted lands within Indian reservations have always been considered by the purchasers of timber, and by the administrative department concerned, to be contracts made for the respective tribal or individual Indians designated therein, and such contracts have been made under the supervision of the Secretary of the Interior, and specifically the Commissioner of Indian Affairs, for the same benefit

[1] Sections 8–11 of Regulations and Instructions for Officers in Charge of Forests on Indian Reservations, approved June 29, 1911, as modified March 11, 1917.

of either the tribe or individual Indians concerned" (R. 40).

The departmental practice has been always to consider such contracts as contracts of the Indians. They are not filed in the Returns Office of the Department of the Interior, as they would be if they were considered to be contracts of the United States. See unpublished opinion of Assistant Attorney General Cobb, *infra*, p. 37.

It is true, as the court below pointed out, that the element of consent, typical of an ordinary agency, was lacking. But it is not unusual for a person to be designated by law as the agent of another for particular purposes, without the consent of the latter, or even against his will. See *Doherty & Co.* v. *Goodman*, 294 U. S. 623, 628. The representative character thus established is fully effective for the limited purposes for which it is created, but it has never been imagined, merely because it had been created by law rather than by designation of the principal, that it is a trusteeship or a guardianship. The mere circumstance that the duty of the Superintendent to act for the Indians is created by law rather than by designation of the Indians clearly does not make it impossible to consider him as acting as their representative in the limited way in which an agent acts rather than as the representative of a trustee or guardian. This circumstance is not in itself sufficient to make the United States a party to these contracts, responsible in damages for a breach.

C. THE UNITED STATES HAS NOT ASSUMED OBLIGATIONS AS GUARDIAN, AS TRUSTEE, OR OTHERWISE, UNDER THE CONTRACTS

Even if the Court should conclude that the Superintendent was acting as a representative of the United States in making the contracts, it does not follow that the United States assumed personal responsibility in connection with their performance. The view that the Superintendent was acting solely as an officer of the United States is not at all inconsistent with the conclusion that the United States in turn was acting in a capacity which did not involve a personal responsibility as trustee or guardian. Even if it should be held that the United States was a party to these contracts as manager of the Indian's property, it is apparent that the capacity in which it acts has no exact analogy in general fields of law. Accordingly no obligation, not clearly undertaken by the United States under these contracts, may properly be imposed upon it merely because such an obligation would be an incident of some fiduciary relationship to which the situation of the United States in these cases has only a specious similarity.

(1) The United States did not contract as a trustee

These contracts were not made by the United States as a typical trustee. A trustee holds title to the trust property. It seems clear from the *Shoshone* case that the United States did not have

title to the timber sold in these cases. In the *Shoshone* case this Court said (304 U. S. at 117):

> The cession in 1904 by the tribe to the United States in trust reflects a construction by the parties that supports the tribe's claim, for if it did not own, creation of a trust to sell or lease for its benefit would have been unnecessary and inconsistent with the rights of the parties.

Furthermore, the United States does not possess the right which a trustee ordinarily has to reimburse itself out of the trust estate. It seems clear that the United States cannot, as a matter of course, pay the judgments or reimburse itself for this payment out of available tribal funds. The Indians' moneys are not public moneys of the United States. *United States* v. *Brindle,* 110 U. S. 688, 693; *Quick Bear* v. *Leupp,* 210 U. S. 50, 77.

Not only does this practical bar to direct reimbursement from the trust estate further distinguish the situation of the United States in these cases from that of a trustee but also, unless effective methods of circumventing it can be devised and made effective, it will result in the Indians receiving a windfall as a result of the phase of the transaction in question here, while the respondents are paid out of general funds of the United States. That result would obviously be anomalous and inconsistent with the trustee analogy. As will be

pointed out later in this brief, it is not necessary to a fair result.

It may be contended that the United States might readily achieve reimbursement, substantially out of the Indian funds, by any of numerous methods, such as appropriating for general use Indian funds equivalent to the judgments paid, or reducing, by a sum equivalent to the judgments, appropriations which in the future might be made for the welfare of these Indians. Such an argument merely emphasizes the inappropriateness of the trustee analogy. Furthermore, it makes it clear that these are suits substantially against the Indians on claims arising under contracts which are substantially Indian contracts, not suits against the United States within the meaning of Section 145 of the Judicial Code. Moreover, it makes it apparent that the assumption of jurisdiction in suits of this kind presages results directly contrary in substance to the settled legislative policy of permitting suits against the Indian tribes only under special Acts, enacted after Congress has had opportunity to consider whether the equities of the claim require, in fairness, that the immunity be relinquished, and to prescribe the terms under which the claim may be asserted. *Thebo* v. *Choctaw Tribe*, 66 Fed. 372, 375–376 (C. C. A. 8th); *Adams* v. *Murphy*, 165 Fed. 304, 308–309 (C. C. A. 8th).

These considerations make it evident that the trustee analogy does not fit these cases.

(2) The United States is not liable as guardian

The language most frequently used in describing the relationship between the United States and the Indians is that of Chief Justice Marshall in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17, where he said that it somewhat resembles that of guardian and ward. But clearly the expression was not used, and was not intended to be used, as precisely definitive or as suggesting that the United States is liable on Indian contracts as a guardian is liable. See *Choctaw & Chickasaw Nations* v. *United States*, 75 C. Cls. 494, 498.

A contract by a guardian on behalf of his ward, relating to real property, must ordinarily be approved by an appropriate court. No judicial approval is required, either by statute or by regulations in respect of contracts for the sale of Indians' timber.

Like a trustee a guardian, having satisfied a judgment against him in his capacity as guardian, may reimburse himself from assets available in his ward's estate. The United States has no such right here, as we have pointed out above, and such means as it might adopt to achieve reimbursement are inimical to the preservation of its established policies towards the Indians. Moreover the United States has not purported to assume liabilities as a guardian. None are to be implied from an inapplicable analogy.

(3) No liability of the United States is to be implied from the provisions of the bonds given by the respondents

It will undoubtedly be urged, as it has been urged heretofore, that the fact that the obligation of the bonds ran to the United States, discloses clearly that the United States was the principal party to the contracts. But the mere fact that the United States possesses a right against third persons in respect of contracts which the latter have entered into with Indian tribes does not inevitably create reciprocal rights in such persons against the United States. A brief consideration of the relationship between the United States and the Indians discloses the error of this contention. The United States has assumed great obligations to the Indians. For generations it has undertaken to manage their affairs, to educate and civilize them, to protect them against their white neighbors, and generally to promote their welfare. It has consistently appropriated large sums of money to make these purposes effective. Necessarily, in carrying out these obligations, it has a right and a duty to assure the most complete accomplishment of the intended results. If, as here, a contract is entered into for the disposition of Indian property, it is proper that the United States should enable itself or its officers, as representatives of the Indians, to enforce, directly and conveniently, performance of the contracts by the persons obligated under them

to the Indians. Obligations of this character are enforced by the United States notwithstanding the fact that the United States may not be a party to the contract. *U. S. Fidelity Co.* v. *Bramwell,* 295 Fed. 331, 333; 299 Fed. 705; 269 U. S. 243; *United States* v. *Pumphrey,* 11 App. (D. C.) 44. It is to be noted, in this connection, that in the transactions involved in these cases the Superintendent was to receive the money paid under the contracts and to deposit it for the account of the Indians. Liability to the United States on the bond is consistent especially with the convenient administration of this provision. The existence of such liability has no more tendency to show that the United States is the responsible principal than the fact that the Superintendent was to receive the money paid in performance of the contract and to deposit it for the Indians. The designation of an agent to receive the proceeds of a sale is common practice. The designation of the same agent to receive any indemnity paid in case of non-performance is not substantially different. It provides no adequate basis for concluding that the agent is not an agent at all but a trustee or a guardian, or, in this case, that the United States is in any way obligated under the contract to pay damages for a breach.

We respectfully submit, therefore, that the lack of any substantial undertaking by the United

States under these contracts makes it clear that they are not contracts of the United States in its own right, and that it has undertaken no responsibility as representative of the Indians for their performance or to repay excessive amounts paid under them to the Indians' account. We submit further that none of the provisions made or steps taken to assure protection of the Indians' interests and their realization of the full benefits of performance is inconsistent with either the express recital of the contracts that they were executed by the Superintendent for and on behalf of the Klamath Indians, or the view that the Klamath Indians are the principal contracting parties and not the United States.

We respectfully submit that if the United States is to be held to be a party to these contracts responsible in damages in these cases, its responsibilities must rest not upon the analogy of trusteeship, or guardianship, nor upon any provisions of these contracts, but rather upon some aspect of the peculiar circumstances in which the United States, by virtue of its sovereignty and by reason of the necessities of the situation, must manage and supervise the affairs of the Indians. We believe that those circumstances and the legislative policy followed with respect to them make it evident that the United States is not intended by Congress to be, and should not be, subject to suit on these contracts in the Court of Claims.

III

THE COURT OF CLAIMS HAS NO JURISDICTION UNDER SECTION 145 OF THE JUDICIAL CODE TO ENTERTAIN SUITS ON THE TRIBAL CONTRACTS EVEN IF THE UNITED STATES BE DEEMED A PARTY TO THE CONTRACTS IN A REPRESENTATIVE CAPACITY

The Court of Claims has general jurisdiction only of suits in which the United States is a defendant and in which a money judgment may be entered against it. It is obvious that if these contracts are contracts of the Indian tribe, the court is without jurisdiction.

The respondents have contended heretofore that the United States holds the timber in trust for the Indians, and that the contracts, even though not made by the United States in its own name, must be construed to be contracts of the United States acting as a trustee to make the sale. We submit that, even if this Court should conclude that the United States was a party to these contracts in a representative capacity, nevertheless the Court of Claims has no jurisdiction under Section 145 of the Judicial Code to entertain a suit against the United States in such representative capacity as it may have had here.

While this Court, as far as we have been able to discover, has never passed expressly upon the precise question presented here, it has held, in *Green v. Menominee Tribe*, 233 U. S. 558, that the United States might not be joined as a party defendant in

a suit against an Indian tribe for what was held to be a breach of contract on the part of the Indian agent. In *Oregon* v. *Hitchcock*, 202 U. S. 60, 70, it has held that there is no Act of Congress assuming on behalf of the United States full responsibility in behalf of its wards, the Klamath Indians, for the result of any suit affecting their rights in these lands. In *Turner* v. *United States*, 248 U. S. 354, it expressly held that the United States might not be joined in a suit against the Creek Indians, even though in that case the United States had been designated as the trustee for the Indians. In *In re Sanborn*, 148 U. S. 222, 227, this Court stated that enactments intended to protect the Indians from improvident and unconscionable contracts by no means created a legal obligation on the part of the United States to see that the Indians perform their part of such contracts. Cf. *Bonner* v. *United States*, 9 Wall. 156, 160. We believe that the decision of the court below in *Leka, Admx.* v. *United States*, 69 C. Cls. 79, states the principle which should govern the question here presented. There suit was instituted against the United States to recover certain postal savings deposits. The deposits, according to law, were held by a board of trustees consisting of public officials of the United States. The Court of Claims held that it was without jurisdiction to entertain such a suit, as it was not a suit against the United States within the meaning of Section 145 of the Judicial Code, and furthermore, because the Secretary of the Treasury

had no fund out of which to pay the judgment should it be rendered. The same is true in the instant case. The funds of the Indians derived from the sale of the timber are private funds, and not public moneys of the United States. *United States* v. *Brindle*, 110 U. S. 688, 693; *Quick Bear* v. *Leupp*, 210 U. S. 50, 77.

It is, of course, settled law that Acts waiving sovereign immunity to suit are to be strictly construed. The persons asserting that the Act waiving immunity covers the suit in question must sustain the burden of proving jurisdiction. *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283; *United States* v. *Edmondston*, 181 U. S. 500, 504; *Matson Navigation Co.* v. *United States*, 284 U. S. 352, 359. We submit that the respondents have failed to meet this burden; that even though these be held to be contracts entered into by the United States, nevertheless they would be contracts of the United States made not for itself but as trustee or guardian or in some other representative capacity and that the Court of Claims has no jurisdiction over suits on such contracts.

The Tucker Act, which was the precursor of Section 145 of the Judicial Code, eliminated claims of Indians against the United States from the jurisdiction of the Court of Claims. It seems unlikely that Congress should have intended at the same time to make the United States liable on contracts in which it had no beneficial interest, which were

entered into solely in the course of its management of the Indians' affairs and which, if judgment is rendered against the United States, would raise questions concerning rights between the United States and the Indians. To the limited extent to which the legislative history is helpful it suggests that such claims as we believe these to be were not intended to be covered by the jurisdiction conferred.* An intent on the part of the Congress to place such a burden upon the Court of Claims is not lightly to be presumed. *United States* v. *Edmondston, supra.*

This is particularly evident in a case such as this where the effect of recognizing jurisdiction would be to open the way to suits the ultimate effect of which (unless the United States has no means, direct or indirect, for reimbursing itself out of Indian funds) would be substantially the same as permitting suits against the Indian tribes in the Court of Claims. As we have pointed out above (*supra*, p. 24), it is not impossible that the United States might reappropriate or withhold sufficient funds which otherwise would be applied for the welfare of the Indians to reimburse itself for the amounts paid out of its general funds under judgments such

* Mr. Tucker, in reporting his bill to the House from a conference, stated—"There was a proposition, I will explain to my friend, at one time in the course of this discussion to introduce claims for captured and abandoned property, for cotton claims, for swamp lands, for Indian claims, and we just said, do not load down a good bill with controverted questions, and defeat the whole." Cong. Rec., Vol. 18, Part 3, p. 2678.

as those in these cases. However, such a practice would be haphazard and indirect and would be likely to lead to misunderstanding by the Indians and possible suspicion of abuse. Furthermore, it does not appear to be necessary in order that persons who contract to buy Indian property, as respondents have done here, may have a fair and effective means of recovering whatever may be due them. The established policy of Congress has been to require persons having claims against the Indians to proceed under special Acts authorizing suit and defining the jurisdiction of the appropriate court for the particular case. That remedy seems especially appropriate here. It is evident from the findings that there is considerable question whether concessions made in the early years of the contract period by the officers representing the Indians in connection with these contracts had not given to the respondents advantages to which they were not entitled under the contract, and whether the alleged overcharge in question here was not merely the result of the Superintendent's effort to recover for the Indians a part of the amount to which they were entitled under the contracts, and which they had failed to realize. The court below indicated that whatever the equities might be with respect to offsetting previous concessions, it was not in a position to consider them in this suit. It would seem to be more consistent with the effective exercise by the United States of its sovereign power to protect the Indians in their

dealings to require, as we believe existing law does require, that claims such as this be submitted first to Congress, which will be in a position, as the Court of Claims is not, to consider all the equities of the entire case and provide for suit under such conditions as will permit the court to consider the whole situation. We see no basis for extending the general jurisdiction of the Court of Claims by a strained construction to include suits such as this, not clearly contemplated by the Act conferring its general jurisdiction, where the possibility of a result substantially nullifying the consistent policy of Congress with respect to claims against the Indians is as apparent as it is here, and where the alternative result leaves the Indians with a windfall and the United States liable on a contract in which it is not beneficially interested.

We submit that in a case of this character, as in the case of other suits against the Indian tribes, the respondents are required, under existing statutory provisions, to seek their remedy first through Congress, setting forth the equities of their claim and leaving it to Congress to decide whether in all the circumstances the immunity should be waived and jurisdiction conferred upon a court to entertain the suit, and to denominate whom the defendant should be, whether it should be the United States, which received no benefit from the contracts, or the Klamath tribe, which was the beneficiary of any error in the decision of the Commissioner of Indian Affairs.

CONCLUSION

We submit that the court below lacked jurisdiction to entertain these suits, and in any event that it lacked jurisdiction of those parts of the suits based upon contracts entered into with Indians holding allotments. The judgment of the court below, therefore, should be reversed.

Respectfully submitted.

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SAM E. WHITAKER,
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Special Assistant to the Attorney General.

JAMES J. SWEENEY,
Attorney.

NOVEMBER 1938.

APPENDIX

Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250) provides in part as follows:

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.*—First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, * * *.

The Act of June 25, 1910, c. 431, 36 Stat. 855, 857 (U. S. C., Title 25, Secs. 406, 407), provides in part as follows:

> SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.
>
> SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

APR. 17, 1912.

SECRETARY OF THE INTERIOR.

SIR: A letter from the Commissioner of Indian Affairs has been submitted, for opinion as to whether contracts for the sale of timber under authority of section 7 of the act of June 25, 1910 (36 Stat. 855), and the regulations of June 29, 1911, must be filed in the Returns Office of the Department of the Interior as contracts made on behalf of the United States within the purview of section 3744, Revised Statutes. The provisions of said act of June 25, 1910, *supra,* are as follows:

"SEC. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: *Provided,* That this section shall not apply to the States of Minnesota and Wisconsin.

"SEC. 8. That the timber on any Indian allotment held under a trust or other patent containing restrictions on alienation, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior."

This office, by opinion of June 13, 1910, advised that contracts for the sale and removal of timber, subject to approval by the Department, are not of the character of contracts required by section 3744, Revised Statutes, to be filed in the Returns Office of the Interior Department. That opinion had

reference to sales of timber under section 8 of said act.

There is no material difference in the character of the contracts, whether the timber is sold under authority of section 7 or section 8 of the act. In the one case, the contract is made by the Secretary of the Interior approving a proposal for purchase of the timber and, in the other case, by a formal contract by the Indian, with the purchaser, approved by the Secretary of the Interior, or by some officer authorized by him. In both cases, however, it is a contract of sale for the sole benefit of the Indian, made under the supervision of the Secretary of the Interior.

While the validity of such contracts depends upon the approval of the Secretary of the Interior, they are solely for the benefit of the Indian and are in no wise contracts made "on behalf of the Government", and are not of the character of contracts which are required by said section 3744, Revised Statutes, to be filed in the Returns Office.

Very respectfully,

(Signed) CHARLES W. COBB,
Assistant Attorney General.

U. S. GOVERNMENT PRINTING OFFICE, 1910